# Commonwealth of Massachusetts
## *District Court Department of the Trial Court*

PITTSFIELD DIVISION
24 WENDELL AVENUE
PITTSFIELD, MASSACHUSETTS 01201
(413) 442-5468

FREDRIC D. RUTBERG
PRESIDING JUSTICE

RITA S. KOENIGS
JUSTICE

LEO F. EVANS
CLERK - MAGISTRATE

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ASST. CLERK-MAGISTRATES


May 19, 2008

Ms. Barbara Berenson
c/o Supreme Judicial Court
John Adams Courthouse
Pemberton Square
Boston, Massachusetts

Re: Canon 3 (B)(9) of the Code of Judicial Conduct

Dear Ms. Berenson:

I read with interest the *ad hoc* committee's proposed amendments to Canon 3 (B)(9) of the Code of Judicial Conduct, and I am writing to you with my comments as the committee has requested.

I agree with the comments of Professor Kaufman and wish to add my support to his proposals. As a sitting trial court judge in a small community with active newspaper coverage, I have been confounded by the constraints of Canon 3(B)(9) since I was appointed to the bench over fourteen years ago. Because the local newspaper is "required reading" for most Berkshire County citizens and it covers matters that larger area papers might overlook, I find myself constantly being confronted by friends and fellow community members with questions or comments about what they have recently read. As a public servant, I feel some obligation to answer the public's questions whenever possible. Often this requires some tightrope walking.

Given my predilection to answer questions and speak with my neighbors, I was eager for the *ad hoc* committee to loosen the constraints imposed by the existing canon. Nevertheless, I find myself persuaded by Professor Kaufman's essential argument that a *post facto* memorandum expressing a judge's rationale for deciding a previous matter will necessarily be regarded with suspicion and incredulity, especially if it is written months after the decision was made. As a wise friend of mine used to tell me: never make excuses; your friends don't need them; your enemies won't believe them. While I truly appreciate the committee's hard work, I am persuaded that the cure they propose is worse than the disease.

It occurs to me that another way to address the conundrum of how to answer the public's legitimate concerns without violating a judge's sworn duty to remain above the fray might be to broaden the definition of "conduct" as it is used in the proposed subsection (d). If this new provision were to define a judge's public

comment about the substantive and procedural law without reference to its application to a particular fact pattern as conduct [such as public instruction on the law], a judge might be able to respond safely, and in a timely manner, to public outcries. At the risk of spreading "war stories", a few examples from my own career may be instructive.

Many years ago, there was a particularly gruesome rape reported on the front page of our paper. A teen age girl was home from school when an intruder broke into the house and put a bag over her head before raping her. Six weeks later, a suspect was arrested on a Friday evening and bail was set at $50,000 by the bail commissioner. The defendant was brought before me the following Monday morning when a full bail hearing was held, after which I set bail at $10,000. Tuesday's paper had a front page headline to the effect "Judge lowers bail on rape case". A public outcry ensued, and eventually I received a letter from the Board of Selectmen of the town in which the victim resided questioning my judgment and commitment to victims' rights. The Selectmen released the letter to the newspaper before it reached me, so its contents were known to me and the public about the same time. I felt a duty to explain the law to the town's citizens: the purpose of bail was only to assure the defendant's appearance in court; the defendant had not posted the bail that I set; and, the district attorney chose not to ask the court the hold the defendant without bail on dangerousness although the crime charged allowed for such a request. At my own peril I wrote the letter and sent it to the Selectmen who gave it to the press inflaming an already angry portion of the public. My letter began with a statement that I could not discuss the pending case, but I wanted the Selectmen to understand some of the nuances in the law. I never mentioned the amount of bail set or my reasons for doing so. I do not know how effective my letter was in dispelling misunderstandings, but it did succeed in allowing me a chance to answer a very public, and misguided attack. I believe that such a response could be given a safe harbor by defining a response that merely discusses the law in a pending case of public interest as conduct: permissible teaching.

Similarly, I think judges should be encouraged, again through safe harbor language, to participate in seminars and panels intended to inform the media on issues of bail, sentencing and the like. I recently met with the editor of our paper and mentioned that I thought it would be useful if stories arising from bail hearings mentioned whether or not the defendant actually made, or was expected to make, the bail set. This was prompted, in large part, from hearing a radio interview with an incendiary police chief from Hampden County who was railing that a judge [not me] set bail on a case an "*only* X thousand dollars". The Chief went on for what seemed to be a long time excoriating soft judges and the like, but no one mentioned the obvious: the defendant was probably in jail and would stay there, because few defendants are able to raise the sum the Chief deemed to be paltry.

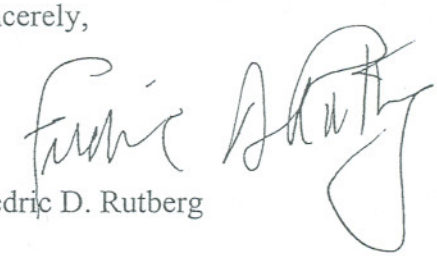
I also explained how routine news articles that say a district court "dismissed" charges against defendants who have been indicted and arraigned in the superior court should mention this latter fact for completeness and to dispel the mistaken inference that when charges are "dismissed" the defendant goes free. This situation is one I confronted on a wholesale basis very early in judicial career, as a column captioned "In the Courts" listed about six serious drug cases I "dismissed" the day before. The list included the defendants' names, their home towns [many were from the New York City area] and the assorted drug charges that were pending [usually trafficking]. An unknowing reader might be justified to think that this judge just opened the jail house door to a bunch of people charged with serious crimes that were infecting the community, when indeed the exact opposite was true: these defendants remain in the same jail but now face far more serious consequences in the superior court than those to which they were exposed in the district court. I believe that judges should be encouraged to bring these procedural issues to a reporter, or an editor, without fear of violation of Canon 3(B)(9). A broad, but specific, definition of "conduct" in subsection (d) could give judges t

he security to raise similar issues which, in turn, might better inform the public, whom we serve.

In sum, I support Professor Kaufman's position on the amendments to Canon 3(B)(9), and I suggest that the *ad hoc* committee look at adding specifics to the term "conduct" beyond that which is already included in the commentary. While I apologize for the length of this letter, I hope that you, and the committee, accept it in the spirit with it is offered: one judge's thoughts on a serious, complicated issue that affects all of us. Finally, I would be delighted to discuss this issue with you, the committee or any portion of it, if anyone might find value in such a discussion.

Please extend my appreciation and heartfelt thanks to the committee members and its staff for their efforts. From discussions with one member, I know how they worked; from the thought responses of the dissenting member, I also know how deeply they all care.

Sincerely,



Fredric D. Rutberg